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1873
In Chancery.

Between MATTHEW PENHALE, AND

Plaintiff,

GEORGE THOMAS CLARIS, JAMES HILL, MARY MILLER,
and ANDREW MILLER, her husband, ANN COLE, and JAMES
COLE, her husband, ~~JOHN PENHALE~~, THOMAS PENHALE, and
MARY PENHALE,

Defendants.

City of London.

To the Honorable the Judges of the Court of Chancery.

amended

The Bill of Complaint of Matthew Penhale, of the Township of Yarmouth, in the County of Elgin, yeoman, the above-named Plaintiff,

HUMBLY SHEWETH:

1. In, or about the year of our Lord 1843, Richard Penhale, of the said Township of Yarmouth, yeoman, the father of your complainant, purchased from one Charles E. Casgrain, who as the owner thereof in fee, for the sum of \$500, the West Half of Lot Number Sixteen, in the eventh Concession of the said Township of Yarmouth, paying one half of the purchase-money own at the time of the purchase, and agreeing to pay the remainder in two years thereafter.
2. At the time of the said purchase the said Richard Penhale informed your complainant that he was purchasing the said lot intending that your complainant should have the same at a future time.
3. At the time of the said purchase and down to the year of our Lord 1850, the said Richard Penhale was possessed in fee simple of a certain farm of 100 acres or thereabouts, situate in the said Township of Yarmouth, called by him "The Homestead," being Lot Number 10, south of the Edgeware Road, in the said Township of Yarmouth, situated only a short distance from the land hereinbefore mentioned, upon which the said Richard Penhale and his wife and your complainant, and other members of the family, then resided, in a log house.
4. In the year following the said purchase, at the request of the said Richard Penhale, your complainant and the Defendant Thomas Penhale, a brother of your complainant, erected a shanty upon the southerly portion of the said west half of Lot Number 16, and began chopping and clearing and otherwise improving the same, which, until then, was entirely wild and uncultivated.
5. Your Complainant attained the age of 21 years in the month of December, in the year of our Lo. 1854.
6. In or about the month of October, in the year of our Lord 1845, your Complainant was about to leave his father's house to work for himself, whereupon the said Richard Penhale, being infirm and unable to do any hard work, promised and agreed with your Complainant, that if your Complainant would remain with him upon the said Homestead, and help him to build a new house which he was about to erect thereon, and to work the said Homestead until the said house was erected, and until certain debts which he then owed (including the balance of the purchase money of the said west half of Lot Number 16) were paid, that he, the said Richard Penhale, would, at his death, give to him by his Will the southerly 75 acres of the said west half of Lot Number 16, and that during the life of the said Richard Penhale, your Complainant might occupy the said 75 acres, and proceed with the clearing and improving of the same.
7. No written memorandum of the said agreement was entered into between your Complainant and the said Richard Penhale, but your Complainant in pursuance of the said agreement, remained with the said Richard Penhale upon the said Homestead, and helped the said Richard Penhale to work the same until the month of January, in the year of our Lord 1850, when the said debts were all paid; and in the years 1846, 1847, and 1848 did a large portion of the work in the erection of the said new house upon the said Homestead, for the said Richard Penhale, being a house about 36 feet by 44 feet, with a stone foundation; and collected the stone for the said foundation; and felled upon a certain lot of land, then belonging to your Complainant, in the said Township of Yarmouth, being the south half of Lot Number 15, in the Seventh

Concession of the said Township of Yarmouth, the large timbers required for the building of the said house, and hewed the same, and drew them to the said Homestead, and completed the erection of the said house.

8. Your Complainant, in further pursuance of the said agreement and relying upon the assurance that the same would be carried out by the said Richard Penhale, entered into possession and proceeded with the clearing of the said 75 acres of the west half of the said Lot Number 16, and by the end of the year 1849, had chopped about 3 or 4 acres thereof.

9. In the month of January in the year of our Lord 1850, the said Richard Penhale, in pursuance of the said agreement with your Complainant, procured a will to be drawn, whereby he devised to your Complainant in fee simple the said southerly 75 acres of the said west half of Lot Number 16, in the Seventh Concession of Yarmouth, adding thereto a direction that your Complainant should pay \$100 to the Defendant Mary Miller, a sister of your Complainant, and \$100 to the Defendant Ann Cole, another sister of your Complainant, to which your Complainant made no objection.

10. Before executing the said will, the said Richard Penhale read the same over aloud to your Complainant and other members of the family, and he then duly executed the said will according to law, and he then and afterwards promised your Complainant that he would not revoke the said will, and that it should be as good as a deed of the said land to your Complainant.

11. After the making of the said will, and relying upon the said promises of the said Richard Penhale, in pursuance of the said agreement and with the full knowledge of the said Richard Penhale, your Complainant proceeded with the clearing and improvement of the said land, and at the time of the death of the said Richard Penhale, hereinafter mentioned, your Complainant, in addition to what he had cleared at the time of the making of the said will of the said Richard Penhale, had cleared and fenced about 11 acres thereof, and put in upwards of 46 rods of drain tiles, and made other valuable and permanent improvements thereon.

12. The said Richard Penhale departed this life on the tenth day of January, in the year of our Lord 1873, leaving a will, being his last will and testament, dated on the twenty-eighth day of August, in the year of our Lord 1869, in the words and figures following, that is to say: "This is the last Will and Testament of me, Richard Penhale, of the Town of St. Thomas, in the County of Elgin, and Province of Ontario, yeoman.

"1st.—My Will is first that my funeral charges and just debts shall be paid by my executors or trustees herein named.

"2nd.—I nominate and appoint as Executors and Trustees of this my Will, James Hill, of the Township of Yarmouth, in the County and Province aforesaid, yeoman, and George Thomas Claris, of the Town of St. Thomas aforesaid, esquire.

"3rd.—I give and bequeath unto my beloved wife Mary all my furniture, linen, bedding, wearing apparel, and other chattel property of which I may die possessed of or entitled to, for her own use and benefit.

"4th.—All my real estate and all the rest and residue of my personal estate, whatsoever and wheresoever situate, and not otherwise disposed of by this my Will, of which I may die seized or possessed, I give, devise and bequeath unto James Hill and George Thomas Claris, my executors above-named, as joint tenants upon the trusts and for the intents and purposes hereinafter named, expressed and declared of and concerning the same.

"5th.—And I declare and direct that my trustees or trustee for the time being under this my Will, shall stand seized and possessed of and interested in my real and personal estate, so devised and bequeathed to them as aforesaid, upon the trusts and for the intents following, that is to say:

"6th.—As to my real estate, that is the west half of Lot Number Sixteen, in the Seventh Concession of the Township of Yarmouth, in the County and Province aforesaid, I do hereby authorize, empower and direct my said trustees or trustee for the time being, at such times and in such manner as they may think best, to make sale and dispose of said Lot, either by public auction or private contract, for the most money and best price that can be reasonably obtained

for the same, and with liberty to my said trustees to buy in and re-sell the same at discretion, and until such land is sold it shall be lawful for the said trustees or trustee for the time being of this my will to grant leases thereof until such land is sold.

"7th.—Out of the proceeds of the sale of the land above-mentioned I request the following money legacies to be paid :

"8th.—I give and bequeath to my daughter Mary Miller the sum of five hundred dollars, and to my daughter Ann Cole the sum of five hundred dollars.

"9th.—I give and bequeath to my son Thomas Penhale the sum of fifty dollars and my blacksmith's tools, and to my son John Penhale the sum of ten dollars ; among other reasons for giving my sons Thomas and John only the sums here mentioned is, that I hold this day notes against Thomas for three hundred dollars, and a note against John for one hundred and forty-two dollars, which I intend to give up to them, but if any or either of their notes should be found in my possession at my decease I request that my trustees should refrain from collecting them, and surrender the same.

"10th.—I give and bequeath to my son Mathew Penhale the sum of two hundred dollars.

"11th.—I give and bequeath to my beloved wife Mary all the rest and residue of my personal property, whether it should be in money or securities for money, for her sole use and benefit during her life, with a request that at her decease, what she has not expended shall be equally divided among my children's children.

"12th.—I request and will that the above legacies shall be paid to the parties as soon as convenient by my trustees. In witness whereof I, the said Richard Penhale, have hereunto set my hand and seal this twenty-eighth day of August, in the year of our Lord one thousand eight hundred and sixty-nine."

13. The Defendants Mary Miller, Ann Cole, ~~John Penhale~~^{Mathew Penhale}, Thomas Penhale, and Mary Penhale, are the persons named in the said will, who alone are interested in the proceeds of the said land, and the Defendants, Andrew Miller and James Cole, are the husbands of the said Defendants Mary Miller and Ann Cole respectively.

13 see back of this sheet

14. Until after the death of the said Richard Penhale, your Complainant was not aware that the said Richard Penhale had in any way altered or revoked the devise to him of the said 75 acres contained in his said will, made in the year of our Lord 1850, but on the contrary your Complainant, during the whole period from the making of the said will in the year of our Lord 1850, down to the time of the death of the said Richard Penhale, relying upon the promises of the said Richard Penhale not to revoke his said will, and in pursuance of the said agreement continued in possession of the said 75 acres, clearing and improving the same, and paying all the taxes thereon, and the said Richard Penhale frequently encouraged your Complainant to proceed with his improvements thereon, telling your Complainant that the land was your Complainant's own as fully as if he had a deed of it.

15. After the death of the said Richard Penhale your Complainant requested the said Defendants, George T. Claris and James Hill, to convey to him the said 75 acres in pursuance of the said agreement of the said Richard Penhale, and offered to pay the said 2 sums of \$100 each mentioned in the said first-mentioned will of the said Richard Penhale, to be paid to the said Defendants, Mary Miller and Ann Cole, but the said Defendants refused to convey the said land to your Complainant, and on the Twenty-second day of February, in the year of our Lord 1873, the said Defendants, George T. Claris and James Hill, brought against your Complainant in Her Majesty's Court of Queen's Bench for Ontario an action of Ejectment to recover possession of the said 75 acres, and also of the remaining 25 acres of the said west half of Lot number 16, in the Seventh Concession of Yarmouth, claiming title to the whole as devisees of the said Richard Penhale.

16. Your Complainant caused an appearance to be entered for him in the said Action of Ejectment, and defended for the said 75 acres only, claiming to be entitled to the same by length of possession.

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17. The said Action of Ejectment was tried upon the seventeenth and eighteenth days of April, in the year of our Lord 1873, at the Assizes for the County of Elgin, and a verdict was rendered against your Complainant in the said Action, and in favor of the above-named Defendants, George T. Claris and James Hill.

18. The Defendants, George T. Claris and James Hill, threaten and intend to enter up judgment in the said Action of Ejectment, and threaten and intend to, and will unless restrained by the order and injunction of this Honorable Court, proceed to execution therein, and will obtain possession of the said 75 acres.

19. Your Complainant has always been ready and willing, and hereby offers, to pay the said 2 sums of \$100 each, which the said Richard Penhale, by his said will, made in the year of our Lord 1850, directed him to pay to the said Defendants, Mary Miller and Ann Cole respectively.

20. The Defendant, Mary Penhale, the Testator's Widow, claims dower in the said lands

21. The executors named in the said will, and the Defendants hereto, have taken out Probate of the said will, and have assumed the burden of the execution thereof.

YOUR COMPLAINANT THEREFORE PRAYS :

1. That it may be declared that the said agreement by the said Richard Penhale, in the sixth paragraph of this Bill of Complaint mentioned, ought to be carried into execution, your Complainant hereby submitting to the payment of the 2 sums of \$100 each, mentioned in the will of the said Richard Penhale, dated in the year of our Lord 1850, as hereinbefore stated.

2. That the Defendants may be ordered to convey and release to your Complainant and his heirs, in pursuance of such agreement, the said 75 acres of land, being the southerly 75 acres of the west half of Lot Number 16, in the Seventh Concession of Yarmouth, subject only to a charge for the payment of the said 2 sums of \$100 each.

3. That the Defendants, George T. Claris and James Hill, may be restrained by the order and injunction of this Honorable Court, for which writ your Complainant specially prays, from issuing any writ or writs of habere facias possessionem in the said Action of Ejectment, and from in any way proceeding to obtain possession of the said lands, or to disturb your Complainant in his possession thereof.

4. That your Complainant may be paid his costs of this suit.

5. That for the purposes aforesaid all proper directions may be given and accounts taken.

6. That your Complainant may have such further and other relief in the premises as to your Lordships shall seem meet.

And your Complainant will ever pray.